

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JASON PAUL MANNON,

Defendant-Appellant.

UNPUBLISHED

December 23, 1997

No. 199287

Allegan Circuit Court

LC No. 96-010058

Before: McDonald, P.J., and Saad and Smolenski, JJ.

PER CURIAM.

Defendant appeals as of right from his jury conviction of first-degree criminal sexual conduct (CSC), MCL 750.520b(1)(a); MSA 28.788(2)(1)(a). We affirm.

I

Defendant first challenges the sufficiency of the evidence presented against him and argues that the jury's verdict was against the great weight of the evidence, specifically calling into question the child victim's credibility and the inconsistencies present in the prosecution's case. We find that defendant's argument is without merit.

In reviewing a sufficiency of the evidence question, we review the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could conclude that the elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; modified 441 Mich 1201; 489 NW2d 748 (1992).

Here, to establish the crime of first-degree CSC, the prosecution was required to prove beyond a reasonable doubt that defendant engaged in sexual penetration with a child under the age of thirteen. MCL 750.520b(1)(a); MSA 28.788(2)(1)(a). "Sexual penetration" has been defined as "sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body." MCL 750.520a(l); MSA 28.788(1)(l). The testimony of a victim need not be corroborated. MCL 750.520h; MSA 28.788(8).

At trial, the six-year-old victim testified that defendant “sort of did a bad thing,” explaining that he “touched [her] by the butt” with his “pee pee,” and that it made her “feel bad” because “it kind of hurted a little.” Although the victim could not remember exactly when the incident occurred, she stated that it was when she was five years old. The pediatrician that examined the victim reported that the victim’s rectum had been repeatedly penetrated by an object consistent with the size of an adult male’s penis. The victim thereafter told several people that defendant, or “Jason,” was the individual who had committed the abuse, or “who did things to [her].” From this evidence alone, we find that a reasonable jury could conclude that defendant penetrated the victim’s rectum in violation of MCL 750.520b(1)(a); MSA 28.788(1)(1)(a).

Defendant also asserts that the verdict was against the great weight of the evidence. However, because no such objection or motion for new trial was made by defendant, he has waived his challenge going to the weight of the evidence presented. *People v Johnson*, 168 Mich App 581, 585; 425 NW2d 187 (1988). In any event, our review of the record reveals that the jury’s verdict does find “reasonable support” in the evidence. *People v DeLisle*, 202 Mich App 658, 661; 509 NW2d 885 (1993).

II

Defendant next contends that the prosecutor erroneously elicited testimony from the victim that he penetrated her multiple times, and faults his trial counsel for failing to object to the admission of this highly prejudicial “prior bad acts” evidence. However, even if this evidence was improperly admitted, its prejudicial effect was minimal considering the fact that the victim’s examining physician had already testified that there was physical evidence that the victim’s rectum had been penetrated repeatedly. Accordingly, absent an objection from defendant at trial, we find no manifest injustice. *People v Burch*, 170 Mich App 772, 776; 428 NW2d 772 (1988).

Moreover, although defense counsel did not object to the testimony, the record shows that he adamantly attacked the victim’s credibility by continually calling the jurors’ attention to the fact that the victim initially reported only one incident of abuse to her mother, her teachers, the officer who interviewed her, and to the court during the preliminary examination. To establish ineffective assistance of counsel, defendant must show that his counsel failed to perform an essential duty and that the failure was prejudicial, without second-guessing matters of trial strategy. See *People v Mitchell*, 454 Mich 145, 155-168; 560 NW2d 600 (1997). Defendant has failed to carry this burden.

III

Defendant next argues that he was denied a fair trial because hearsay testimony from the victim’s teachers was erroneously admitted in that statements made by the victim in her kindergarten classroom were not spontaneous or “excited,” and they were not the first corroborating statements the victim made concerning the alleged abuse. We conclude, however, that because defendant failed to preserve this issue by raising an objection at trial, the evidence in question, even if inadmissible hearsay, “may be considered and given probative effect as if it were in law competent evidence.” *People v Maciejewski*, 68 Mich App 1, 3; 241 NW2d 736 (1976). Moreover, we find that no manifest

injustice resulted from its admission because additional corroborating medical testimony existed on the record to support the victim's allegations of sexual abuse, making the victim's statements to her teachers merely cumulative and not determinative of the outcome of defendant's trial.

IV

Defendant also argues that he was denied a fair trial due to the prosecutor's improper and highly prejudicial closing argument, wherein she: (1) vouched for the credibility of her own witnesses; (2) suggested that the defense purposely fabricated its case in order to "fit the facts" already in evidence; (3) invoked the sympathy of the jurors; (4) denigrated defendant and his witnesses; and (5) argued facts not in evidence. We disagree, and find that although the prosecutor's argument may have been stridently delivered, the prejudicial effect of her comments, if any, could have been diminished had defendant raised an objection and requested a curative instruction during trial. Accordingly, we conclude that defendant is not entitled to a new trial. *People v Duncan*, 402 Mich 1, 15-16; 260 NW2d 58 (1977); *People v Gonzalez*, 178 Mich App 526, 535; 444 NW2d 228 (1989).

V

Finally, defendant claims that the trial court had a duty, *sua sponte*, to give certain instructions to the jury concerning: (1) the uncharged and improper sexual acts engaged in by defendant (acts testified to by the victim, but for which defendant was not on trial); (2) the incriminating statements defendant supposedly made to the interviewing officer; and (3) the inconsistent statements of the victim. Defendant also faults his trial counsel for failing to request these instructions. Again, we find that defendant's arguments are without merit.

Defendant asserts that the lower court should have instructed the jury on pertinent portions of the Michigan Standard Jury Instructions, (CJI2d 20.28, uncharged acts in child CSC cases; CJI2d 4.1, a defendant's statements that are used against him; and CJI2d 4.5, speaking to impeachment by prior inconsistent statements). However, according to MCR 2.516(D)(2), pertinent portions of the standard jury instructions must be given only where they are applicable, they accurately state the applicable law, and *they are requested by a party*. Moreover, MCL 768.29; MSA 28.1052 states in part that "[t]he failure of the court to instruct on any point of law shall not be ground for setting aside the verdict of the jury unless such instruction is requested by the accused."

Apart from the fact that defendant did not request any additional instructions at trial, the absence of the instructions did not leave the jury without direction. At the conclusion of the proofs at trial, the court instructed the jurors that they may accept or reject everything or any part of a witness' testimony, explained to them how to assess witness credibility and believability, told them that they did not have to believe the expert medical witness or afford any special credence to the police officers who testified, and guided them in dealing with inconsistent testimony. Any concern by defendant that the jury was unable to fairly assess his or the victim's credibility is therefore unwarranted.

Defendant also calls into question his trial counsel's failure to request the instructions. However, as defendant notes on appeal, counsel's strategy during trial was: (1) to attack the victim's credibility by

emphasizing her inconsistent testimony and by arguing that she was coached to lie by her mother, and (2) to strongly suggest that although the child victim may have been abused, it was not defendant who committed the penetration. We find that any instruction that would address prior bad acts committed by defendant or incriminating statements made by him would contradict defendant's theory that he committed no bad acts nor told anyone he did. Moreover, we note that although counsel did not specifically request an instruction on impeachment by prior inconsistent statements, he strongly attacked the victim's credibility at trial and made the jury aware of the defense's theory that she could not be believed because her testimony was full of inconsistencies. Consequently, we find that defendant has failed to establish any prejudice resulting from counsel's actions, or that counsel was not acting strategically in deciding not to request the instructions in question or object to their omission. *Mitchell, supra*. Defendant is not entitled to a new trial.

Affirmed.

/s/ Gary R. McDonald
/s/ Henry William Saad
/s/ Michael R. Smolenski